UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

GAREY E. LINDSAY, REGIONAL DIRECTOR OF THE NINTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

AP GREEN INDUSTRIES, INC.

Respondent

Civil No. 2:16-mc-26
Chief Judge Edmund A. Sargus, Jr.
Magistrate Judge Elizabeth A. Preston Deavers

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR PRELIMINARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

Petitioner hereby submits its Reply to Respondent A.P. Green Industries Inc.'s Memorandum in Opposition to Petition for Preliminary Injunction Under Section 10(j) of the National Labor Relations Act (Memorandum in Opposition). Respondent has failed to show that reasonable cause does not exist to believe that Respondent committed unfair labor practices in violation of the National Labor Relations Act, and has also failed to show that injunctive relief is not just and proper. Thus, Petitioner respectfully submits that its Petition for Preliminary Injunction should be granted.

I. There is Reasonable Cause to Believe that Respondent Committed Unfair Labor Practices

In its Memorandum in Opposition, Respondent states a number of facts that are contrary to those submitted by Petitioner in support of its petition. Notably, Respondent asserts that it always sought to close a $600,000 annual, rather than total, discrepancy between the employees'

wages and benefits and the market. Moreover, it denies that its representative David O'Casek told Union representative Randy Basham that "the powers that be" were upset about employees turning down Respondent's final offer and would be making a harsher offer. Such factual disputes do not defeat a finding that reasonable cause exists to believe that Respondent committed unfair labor practices. As explained in more detail in Petitioner's memorandum in support of its petition for injunction (Memorandum in Support), the District Court should not resolve conflicts in the evidence or issues of credibility of witnesses, but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability. See *Ahearn v. Jackson Hospital*, 351 F.3d 226, 237 (6th Cir. 2003); *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001); *Gottfried v. Frankel*, 818 F.2d 485, 493-94 (6th Cir.1987). The Petitioner has submitted sufficient facts in support of its theory of liability in its Petition and accompanying Memorandum in Support. Insofar as Respondent claims that the Union did not return Respondent's calls and reneged on agreements, presumably to demonstrate that the Union somehow shares liability for Respondent's actions, such alleged conduct, even if true, occurred well after the lockout and is not a defense to Respondent's unlawful conduct on May 14. In sum, the Petitioner has met its "relatively insubstantial" burden of establishing reasonable cause. *See Ahearn v. Jackson Hospital*, 351 F.3d at 237.

Respondent further argues that Petitioner's position in this case is directly contrary to a position it took in an internal advisory memo, *Meridian Automotive Systems*, Case 09-CA-42952, GC Advice Memo (Jan. 16 2007), in which the Board's General Counsel concluded that an employer did not violate the Act when it instituted a lockout and presented a regressive proposal to the Union three months later. GC Advice Memos are internal advisory memos carrying no

precedential value outside of the General Counsel side of the Board. In any event, *Meridian* is distinguishable. First, in the instant case, there is evidence that Respondent demonstrated its animus towards the employees' protected right to reject Respondent's final contract offer when it told the Union that the powers that be were upset and would make a more harsh offer. In *Meridian*, there were no statements by the employer's agents indicating that any proposals were retaliatory or otherwise discriminatorily motivated. Second, there is nothing to indicate that the employer's regressive offer in *Meridian* was illogical. In contrast, Respondent's May 14, 2015 offer sought over $355,000 more in concessions than it ever sought throughout the entire pre-lockout negotiations (see Petitioner's Memorandum in Support). Respondent also failed to sufficiently explain its need for the new non-economic concessions that it sought in its unlawful post-lockout proposals. Thus, Petitioner's position is not contrary to the position taken in *Meridian.*

Respondent argues that after May 14, it continued to bargain with the Union and did not use a "take it or leave it" approach - thus the lockout was not converted to an unlawful lockout. As explained in Petitioner's Memorandum in Support, Respondent's actions nevertheless precluded meaningful bargaining by forcing the Union to bargain out of the hole that it created with its May 14 concessionary proposal that far exceeded its starting position at negotiations. Once the bargaining process was tainted, Respondent's incremental retreat from such unlawful bargaining position fell sorely short of curing the unlawful conduct – or even returning to the status quo ante.

Finally, Respondent argues that because the charges underlying this matter were initially dismissed, Petitioner cannot show that reasonable cause exists that the unfair labor practices occurred. Respondent omits the fact that at the time of the initial dismissal it had not

yet provided Petitioner with several relevant documents, including the cost savings breakdowns for its first and final pre-lockout proposals (both of which sought substantially less in concessions than Respondent's May 14 proposal). Moreover, upon considering such evidence, the Board's General Counsel ultimately found that the evidence was sufficient to establish that Respondent violated the Act and his recommendation to seek an injunction in this matter was approved and authorized by the Board itself. Thus, again, Petitioner has met its relatively insubstantial burden.

II. Injunctive Relief is Just and Proper

Respondent argues that the request to end the lockout and offer employees immediate reinstatement goes beyond restoration of the status quo. The status quo is that which existed before the unfair labor practices took place. See *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 n.3 (6th Cir. 1988). In this case, the unfair labor practices encompass the unlawfully regressive proposals since May 14, 2015, which tainted the lockout and converted it to an unlawful lockout. Because the lockout has been tainted, the status quo necessarily entails ending the lockout because, at this juncture, it is no longer being used solely in furtherance of Respondent's legitimate bargaining position, but rather to further the unlawful conduct. The looser interpretation of the status quo that Respondent advances would swallow whole the Act's impediment to remedial failure. There is simply no way to delineate between the lawful portion of the lockout and the unlawful portion of it short of reinstating the employees in the interim.

Equally unavailing is Respondent's claim that an order requiring it to withdraw its regressive proposals is overbroad and infringes upon Respondent's lawful right to make proposals. Because Respondent's proposals are tainted by its May 14 proposal, which required

the Union to bargain from a hole, there is no way to separate Respondent's unlawful proposals from its unlawful motivation, and Respondent has deprived itself, at least initially, of using such regressive proposals in support of its bargaining position. Petitioner does not seek to permanently deprive Respondent of the ability to make *any* regressive proposals. However, the edicts of good faith bargaining dictate that in order to restore the status quo, it must wipe the slate clean of such proposals to the extent that they were predictably unacceptable, retaliatory and made with no ostensible intention of reaching agreement.

Finally, Petitioner did not unreasonably delay in requesting an injunction. While the Sixth Circuit holds that delay is a *permissible* consideration in denying a section 10(j) petition, "especially if the harm has already occurred and the parties cannot be returned to status quo," (emphasis added) *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987), considerations of timing should not eclipse questions of "whether it is necessary to return the parties to status quo pending the Board's proceedings in order to protected the Board's remedial powers." *Frankel*, 818 F.2d at 495. Courts have recognized the inevitable delay in filing 10(j) petitions given that unfair labor practice charges must first be filed and investigated, a complaint must then be issued, and before injunctive relief can be requested, the Regional Director must secure permission from the Board. *Frankel*, 818 F.2d at 492 fn 3. Thus, courts have granted 10(j) injunctions in cases where significant time elapsed between the occurrence of the unfair labor practices and the filing of the 10(j) petition. See, e.g., *Glasser v. Heartland-University of Livonia, MI, LLC*, (632 F.Supp. 2d 659, 675-76 (E.D. Mich. 2009)(granting injunction after a 10 month delay) and *Muffley v. Spartan Mining Co.*, 570 F.3d 534 (4th Cir. 2009) (granting injunction despite an 18-month delay between the alleged unfair labor practices and the petition for section 10(j) relief).

Here, upon receiving authorization from the Board to request injunctive relief, the Petitioner acted within three business days. Any prejudice caused by the delay is slight when compared to the potential harms to employees' rights and the strong public policy interests favoring injunctive relief as previously described in Petitioner's Memorandum in Support. Consequently, the delay should not stand in the court's way of protecting employees' statutory rights from irreparable harm.

CONCLUSION:

For the foregoing reasons, and for the reasons previously stated in Petitioner's Memorandum in Support, the requested injunctive relief should be granted.

Dated at Cincinnati, Ohio this 15th day of March 2016.

/s/ Zuzana Murarova
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2016, a true and correct copy of the foregoing Petitioner's Reply to Respondent's Memorandum in Opposition to Petition for Preliminary Injunction Under Section 10(j) of the National Labor Relations Act, as Amended, has been served upon Respondent's counsel of record by the Court's ECF system.

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